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No. 08-368

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CONSTITUTIONAL, CRIMINAL PROCEDURE, AND OTHER LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?

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INTEREST OF *AMICI CURIAE*

Amici, listed in the Appendix, are constitutional, criminal procedure, and other legal scholars whose research and teaching touch upon the issues raised in this case.[1] *Amici* respectfully submit that although this Court has approved a limited number of civil detention schemes that have superficial similarities to petitioner's, those approved detentions in no way suggest that the government may indefinitely confine petitioner without criminal process.

SUMMARY OF ARGUMENT

The government has detained petitioner Ali Saleh Kahlah al-Marri, without criminal process, for more than seven years, and it asserts a power to continue his detention indefinitely. Pet. App. 8a. The Executive has issued a determination accusing al-Marri of serious crimes, Pet. App. 466a-67a, but his confinement cannot be a punishment for those crimes because he has not been charged or convicted. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("As [he] was not convicted, he may not be punished."). Thus, if al-Marri's confinement is lawful, it must be sustained as a civil detention — a narrow category of confinement that may be imposed without criminal process.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

This Court has previously considered challenges to military detentions imposed without the safeguards of the criminal justice system.[2] As al-Marri's brief demonstrates, *see* Pet. Br. 48-55, those decisions do not sanction the extraordinary detention power that is claimed here.

The Court has also approved a limited number of civil detention schemes outside of the military context, such as ones involving mentally ill persons, sexually violent predators, or pretrial detainees. Some of these schemes bear superficial similarities to al-Marri's detention. For example, some have as their central purpose the incapacitation of persons found to be dangerous, much as the government contends that al-Marri's detention is necessary to prevent him from aiding al Qaeda. Pet. App. 467a. And some constitutionally valid civil detentions may be of indefinite duration, just as the government asserts a power of indefinite detention here. But, as demonstrated below, this Court's decisions concerning civil detentions provide no authority to indefinitely detain al-Marri without charge or conviction.

Criminal process, with its many safeguards, is the primary and near-exclusive means by which the government may impose prolonged confinement. And so it must remain, lest the government resort to civil

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[2] *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Moyer v. Peabody*, 212 U.S. 78 (1909); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

detention to lower its burden of proof or free itself from other constraints when pursuing goals that are rightly the object of criminal prosecution.

The limited civil confinements held to be constitutionally sound by this Court are meaningfully distinct from al-Marri's confinement. First, where the government would detain for an indefinite duration a person lawfully present in the United States on the ground of dangerousness, this Court has required it to prove that the detainee suffers from a severe mental disorder or other impairment that makes it difficult or impossible to control his dangerous behavior—a factor that is not present here. Second, to pass constitutional muster, civil detention cannot be punitive in either its purpose or its conditions. Al-Marri's detention, however, appears to be punitive in both aspects: after first being criminally charged, he was transferred to military custody only after, reportedly, he refused to provide information, and his conditions of confinement are, according to some of his former jailers, unduly harsh. Third, civil detention schemes have been upheld only in circumstances where the criminal process would be inadequate to serve the government's legitimate interest in confinement, because the rationale for detention—being mentally ill, for example, cannot be criminalized. Here, however, if the government's accusations are true, al-Marri has engaged in criminal acts and it is wholly unclear why ordinary criminal punishment would not vindicate its interest in detention.

Nor do the civil detention cases sustain the government's claim to have statutory authority to confine al-Marri indefinitely. The government contends,

and the Fourth Circuit held, that the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), implicitly gave it such authority. The civil detention schemes approved by this Court, however, were not founded on any implicit grant of power. Rather, they were established by clear legislative statements, as is appropriate where the government would act in an area so fraught with constitutional concerns and would bear the heavy burden of proving a constitutionally proper legislative purpose.

For these reasons, and others set forth below, the Court's acceptance of a narrow category of permissible civil detention schemes in no way suggests that the government's confinement of al-Marri is somehow freed of the ordinary constraints placed on the fearsome power of incarceration.

ARGUMENT

I. With Carefully Limited Exceptions, the Criminal Process—Requiring Charge, Conviction, and Other Safeguards—Is the Sole Means by Which the Government May Deprive a Person of Liberty.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). Accordingly, this Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)). The Federal Constitution expressly guarantees a remedy to vindicate this right in all but

the most extraordinary circumstances, allowing the writ of habeas corpus to be suspended only "when, in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

The primary means by which the government may impose prolonged detention is, of course, by criminal prosecution. Numerous constitutional and other safeguards inhibit the government from exercising criminal process in an arbitrary or unfair manner. Among these safeguards are the right to be free from unreasonable searches and seizures;[3] the requirement that arrest be based on probable cause to believe that the arrestee has committed a crime;[4] the right to be informed of certain rights before a custodial interrogation;[5] the right to effective assistance of counsel;[6] the right to indictment by a grand jury for serious crimes;[7] the right to reasonable notice of the charged offense;[8] the right to trial by an impartial jury;[9] the right to a speedy and public trial;[10] the presumption of innocence;[11] the requirement that the government

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[3] U.S. CONST. amend. IV.

[4] *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

[5] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[6] U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

[7] U.S. CONST. amend. V.

[8] U.S. CONST. amend. VI; *In re Oliver*, 333 U.S. 257, 273 (1948).

[9] U.S. CONST. amend VI; U.S. CONST. art. III, § 2, cl. 3.

[10] U.S. CONST. amend VI.

[11] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

prove beyond a reasonable doubt every fact necessary to make out the charged offense;[12] the privilege against self-incrimination;[13] the right to confront and cross-examine witnesses;[14] the right to present witnesses and use compulsory process;[15] the government's duty to disclose exculpatory evidence;[16] the prohibition against double jeopardy;[17] the prohibitions against bills of attainder and *ex post facto* laws;[18] the rule of lenity;[19] and the prohibition against selective prosecution.[20]

These protections are routinely provided because our system of government, "with only narrow exceptions . . . , incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Foucha*, 504 U.S. at 83; *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("this Court has said that government detention violates [the Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive circumstances") (internal quotation marks and citations omitted); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality) ("In our

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[12] *In re Winship*, 397 U.S. 358, 364 (1970).

[13] U.S. CONST. amend. V.

[14] U.S. CONST. amend. VI.

[15] U.S. CONST. amend. VI.

[16] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[17] U.S. CONST. amend. V.

[18] U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

[19] *United States v. Bass*, 404 U.S. 336, 347 (1971).

[20] *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

society liberty is the norm, and detention without trial is the carefully limited exception.") (internal quotation marks omitted).[21]

In the rare circumstances in which it has been judged permissible, civil detention, while still subject to due process constraints, provides substantially fewer protections than are afforded by criminal process. Thus, the grounds for civil detention must remain strictly limited, so that the government cannot use it to effectuate punishment or to escape the comprehensive constraints of the criminal justice system. *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (noting that civil commitment must not "become a mechanism for retribution or general deterrence") (internal quotation marks omitted); *Hamdi*, 542 U.S. at 556-57 ("It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.") (Scalia, J., dissenting).

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[21] *See also* THE FEDERALIST No. 84 (Alexander Hamilton)

> 'To bereave a man of life, . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person . . . is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.'

(*Quoting* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131-133 (1765)).

II. The Indefinite Detention of al-Marri without Charge or Conviction Finds No Support from the Limited Group of Permissible Preventive Detention Schemes.

While criminal process must remain the near-exclusive means of prolonged detention, there are "a limited number of well-recognized exceptions." *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). These historically grounded confinements are often called *preventive*—as opposed to *punitive*—detentions, because they typically aim to prevent the occurrence of a future harm. Preventive detention schemes that have been found to be constitutionally permissible include confinements based on mental health;[22] public health (quarantine);[23] juvenile jurisdiction;[24] pre-trial confinement in criminal proceedings;[25] and pre-hearing confinement in immigration proceedings.[26] Any superficial similarities aside, the Court's acceptance of these preventive detention schemes provides no basis to sustain al-Marri's indefinite confinement, notwithstanding the Executive's conclusion that "detention of Mr. al-Marri is necessary to prevent him from aiding al-Qaeda." Pet. App. 467a.

Civil confinement raises particularly serious constitutional concerns when it is of indefinite duration,

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[22] *See Addington v. Texas*, 441 U.S. 418 (1979).

[23] *See O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

[24] *See Schall v. Martin*, 467 U.S. 253 (1984).

[25] *See Salerno*, 481 U.S. at 739.

[26] *See Zadvydas*, 533 U.S. at 678.

as this Court has recognized. *See Zadvydas*, 533 U.S. at 696. As the Court's precedents show, the fact that an intended detainee is dangerous is not, by itself, sufficient for the government to impose indefinite detention outside of criminal process. Rather, the Court has allowed the government to impose *indefinite* civil detention only when dangerousness is accompanied by an additional factor, such as severe mental illness, that makes it difficult or impossible for the detainee to control his dangerous behavior. No mental disorder or other impairment to self-control is asserted to justify al-Marri's detention here.

Constitutionally valid civil detentions share two additional aspects: they cannot be punitive in either purpose or condition, and they have been imposed only where criminal process would be inadequate to serve the government's legitimate interest in confinement. The absence of both features here confirms that al-Marri's detention is meaningfully different from the schemes previously permitted by this Court.

A. This Court Has Rejected the Notion That Dangerousness Alone Is a Sufficient Ground for Civil Detention of Indefinite Duration.

The Executive has determined that al-Marri presents a danger to national security and should therefore be indefinitely detained. Pet. App. 467a. Some civil detentions approved by this Court have similarly involved claims that the detainees are too dangerous to be released. The Court has been clear, however, that civil detention of indefinite duration cannot be justified by dangerousness alone. *See, e.g., Crane*, 534 U.S. at 412 (holding that proof of a repeat sex offender's dangerousness is not a sufficient ground for indefinite civil commitment); *Foucha*, 504 U.S. at 82-83.

To be sure, dangerousness is a crucial factor in certain established preventive detention schemes, which, like al-Marri's detention, may be of indefinite duration. For example, where the government civilly commits sexual predators or mentally ill persons, the confinement must rest on a finding that the detainee poses a danger to himself or others. *Kansas v. Hendricks*, 521 U.S. 346, 357-58 (1997). But proof of dangerousness, by itself, will not suffice. Rather, this Court has required the government to have "proof of some additional factor . . . . that makes it difficult, if not impossible, for the person to control his dangerous behavior." *Id.* at 358.

Accordingly, the Court has sustained preventive detention schemes that require—in addition to dangerousness—that the detainee have a "mental abnormality" or "personality disorder," *id.*; be "mentally ill," *Addington*, 441 U.S. at 426; have a "mental disorder," *Allen v. Illinois*, 478 U.S. 364, 370-71 (1986); be "mentally retarded," *Heller v. Doe*, 509 U.S. 312, 314-15 (1993); or have a "psychopathic personality," *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271-72 (1940). Such confinements may last for as long as the necessary grounds for detention are present, and thus may be of indefinite duration. *Hendricks*, 521 U.S. at 363-64; *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

As this Court explained in *Hendricks*, which upheld a law providing for civil commitment of sexual predators, the effect of requiring a mental disorder or similar impairment is to "narrow[] the class of persons eligible for confinement to those who are unable to control their

dangerousness." 521 U.S. at 358. Where indefinite detention is concerned, this limitation on the class of potential detainees is constitutionally compelled. *Zadvydas*, 533 U.S. at 691 ("In cases in which preventive detention is of potentially *indefinite* duration, we have . . . demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness . . . ."); *Crane*, 534 U.S. at 413 (2002) ("there must be proof of serious difficulty in controlling behavior").[27]

Thus, where a state sought to indefinitely confine, without criminal conviction, a person who was dangerous but had no accompanying mental disorder, this Court held the detention unconstitutional. In *Foucha*, *supra*, the Court considered the continued involuntary confinement of an insanity acquittee whose mental illness was in remission but who had an "antisocial personality," which, a lower court found, "rendered him a danger to himself or others." 504 U.S. at 74-75, 78. This Court concluded that the asserted justification for detention—dangerousness alone—was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement." *Id.* at 82; *see also Jones*, 463 U.S. at 368 ("The committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous.") (emphasis added).

The requirement that an impairment to self-control, in addition to dangerousness, be proved to justify

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[27] To the extent that quarantine may result in indefinite confinement, it can be justified by the same rationale—the detainee's inability to control the spread of the dangerous contagion.

indefinite detention serves important constitutional purposes. It prevents the government from relying on civil detention as the principal means of controlling recidivists or other persons whose past behavior warrants an inference of dangerousness. *See Crane*, 534 U.S. at 413 ("[T]he severity of the mental abnormality . . . must be sufficient to distinguish the [civil detainee] from the dangerous but typical recidivist convicted in an ordinary criminal case."); *Foucha*, 504 U.S. 82-83 (rejecting a rationale for indefinite confinement that could be applied to "any convicted criminal, even though he has completed his prison term"). Relatedly, it gives effect to the requirement that there be an *actus reus* to complete a criminal offense, and to the constitutional prohibition against criminalizing mere status—safeguards that would have no force if the government could "preventively" detain persons on the basis of dangerousness alone. *See Robinson v. California*, 370 U.S. 660 (1962) (striking down a law criminalizing the status of narcotic addiction).[28]

While this Court has, in isolated circumstances, approved civil detentions based solely on dangerousness, it has done so only when the confinement was adjunct

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[28] Prohibiting indefinite confinement on the ground of mere dangerousness has philosophical underpinnings as well. Absent some volitional impairment or similar disorder, indefinite *anticipatory* confinement—*i.e.*, a possible life sentence imposed to prevent a voluntary act that the detainee may never choose to take—is fundamentally at odds with the concept of individual liberty. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2, at 195 (2d ed. 1986) ("[T]he common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined.").

to proper criminal (or juvenile) jurisdiction and was limited in duration. For example, in *Schall*, *supra*, the Court upheld a state law providing for brief pretrial detention of accused juvenile delinquents based on a finding of serious risk that the detainee may, before the return date, commit a criminal act. 467 U.S. at 255. Unlike al-Marri's detention, confinement under the law upheld in *Schall* could last only for a brief period. The "maximum possible detention" for juveniles "accused of a serious crime" was just 17 days, and only six days for those accused of less serious offenses. *Id.* at 270. The Court held that the state's legitimate interest in "protect[ing] the child and society from the potential consequences of his criminal acts" was sufficient to warrant such detention. *Id.* at 264. Emphasizing the short period of confinement, the Court observed that "[t]hese time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case." *Id.* at 270-71.

Similarly, in *Salerno*, *supra*, this Court upheld a law providing for adult pretrial detention of arrestees if the government proved that no release condition would reasonably assure the safety of others or the community. 481 U.S. at 741. As in *Schall*, the Court underscored the limited period of confinement, explaining that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[29]

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[29] The Speedy Trial Act provides that trial or other disposition of cases involving a person "being held in detention solely because he is awaiting trial . . . shall be accorded priority," 18 U.S.C. § 3164(a)(1), and that trial of such persons "shall commence not later than ninety days following the beginning of such continuous detention," *id.* § 3164(b).

Id. at 747. When, in *Foucha*, this Court later invalidated a statute providing for *indefinite* detention on the sole ground of dangerousness, it relied on the time limitations of pretrial detention to distinguish *Salerno*: "It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. Here, in contrast, . . . [Foucha] may be held indefinitely." 504 U.S. at 82 (citing *Salerno*, 481 U.S. at 747; *Schall*, 467 U.S. at 269).[30]

This Court distinguished *Salerno* on the same ground when considering the constitutional implications of indefinite detention of lawfully admitted aliens in *Zadvydas*. 533 U.S. at 691 (citing *Salerno*, 481 U.S. at 747). There, to avoid "serious constitutional concerns," the Court construed a federal statute to contain "an implicit 'reasonable time' limitation" to the government's power to detain aliens subject to a final order of removal. *Id.* at 682. *Zadvydas* did not, as the Court noted, involve a claim of "terrorism" as a ground for indefinite detention, as this case does. *Id.* at 696. But *Zadvydas* did address more generally the notion that dangerousness provides a constitutionally sufficient

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[30] Other varieties of temporary confinement may be justified not because of the dangerousness of the detainee but because they are incidental to criminal process and necessary for that process to function properly. *See Bell v. Wolfish*, 441 U.S. 520, 523 (1979) (approving detention to ensure detainees' presence at trial); *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (approving detention to await a probable cause determination after arrest); *cf. Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that the state may detain an arrestee who is incompetent to stand trial only long enough to determine if he could become competent). Here, al-Marri's detention is not adjunct to any criminal or other proceeding.

basis for indefinite confinement. The statute construed there permitted prolonged detention, incidental to the immigration and deportation process, if the alien was "determined . . . to be a risk to the community." *Id.* at 682. And indeed, both aliens whose detentions were reviewed by this Court had engaged in dangerous acts. *Id.* at 684 ("Zadvydas has a long criminal record."); *id.* at 685 ("Ma was involved in a gang-related shooting."). The Court nonetheless read into the statute an implied presumption that the period of detention would not exceed six months, because of the "serious constitutional problem" that would otherwise be raised. *Id.* at 690, 701.[31]

Taken together, the Court's preventive detention decisions make clear that it has not permitted indefinite confinement based on dangerousness alone. Accordingly, those decisions give no support to the power of indefinite detention claimed by the government here.

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[31] The Court has been more permissive of detentions of aliens who have *not been allowed entry* to the United States. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (upholding indefinite detention of alien at Ellis Island); *cf. Zadvydas*, 533 U.S. at 692-93 (distinguishing *Mezei*). *Mezei* is of no help to the government here, because al-Marri lawfully entered and legally resided in this country. Pet. App. 12a. The government concedes that legal residents such as al-Marri have the same due process rights to be free from unlawful detention as U.S. citizens. Pet. App. 65a. Indeed, because the AUMF makes no distinctions between aliens and citizens, *see Hamdi*, 542 U.S. at 519 (plurality opinion), the government has consistently argued that the statute authorizes it to detain citizens as well, *see* Pet. App. 28a, 39a n.14 (Motz, J.), and it has twice done so, in the cases of Yaser Hamdi and Jose Padilla.

B. Unlike Preventive Detentions Held to Be Constitutionally Valid, al-Marri's Detention Has Punitive Purposes and Conditions and Serves Governmental Purposes Fully Achievable by Normal Criminal Process.

The indefinite detention of al-Marri differs from permissible civil detentions in two additional respects. First, to comply with the Due Process Clause, civil detention must not be punitive in either purpose or with regard to the physical conditions of confinement, and al-Marri's detention appears to be punitive in both aspects. Second, civil detentions have been approved only when criminal process would be inadequate to serve the government's legitimate interest in confinement, and that is not the case here.

This Court has not sustained a civil detention scheme where the restriction on liberty is punitive in purpose or where the physical conditions of confinement are punitive, since a governmental interest in punishment must be vindicated through criminal process. *Salerno*, 481 U.S. at 746-48; *Bell*, 441 U.S. at 535-37. Here, al-Marri's confinement appears to be punitive in both respects. The government's purpose could not have been preventive because al-Marri was already properly detained criminally, with no prospect for imminent release, when he was declared an enemy combatant and transferred to military custody.[32] Pet. App. 54a n.19

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[32] Al-Marri was in solitary confinement, and had been for some eighteen months, when the President deemed him a "present . . . danger to the national security of the United States." Pet. App. 467a.

(Motz, J., concurring in the judgment). Moreover, there were reports that al-Marri was transferred because he had become a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." *Id.* (quoting JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 168-69 (2006)). If so, the purpose of the detention is to punish al-Marri for non-cooperation, which is not a valid objective for civil confinement. Further, the conditions of al-Marri's detention have been reported to be unduly punitive. *See* Pamela Hess, *Officer Wrote of Harsh Treatment of U.S. Detainee*, L.A. TIMES, Oct. 10, 2008, at A2 (reporting that officers at the Naval Brig had warned Pentagon officials that detainees, including al-Marri, were being "driven nearly insane by months of punishing isolation and sensory deprivation"). Such conditions, even if assumed to be constitutional under some set of facts, are not justified by the goal of incapacitation. *See Hendricks*, 521 U.S. at 346; *Salerno*, 481 U.S. at 747; *Schall*, 467 U.S. at 270-72; *Bell*, 441 U.S. at 535-37.

A further reason that al-Marri's preventive detention is unlike any scheme sustained by this Court is that the government has not shown that its legitimate interests in confinement cannot be served by the criminal process. *See Foucha*, 504 U.S. at 82 ("the State does not explain why its interest would not be vindicated by the ordinary criminal processes"). Some permissible civil detentions have been based on status determinations—*e.g.*, being mentally ill, or having an infectious disease—that could not constitutionally be criminalized. *Robinson*, 370 U.S. at 660. Others, such

as pretrial detention, occur only while the criminal process is still unfolding. The government's legitimate interests in these confinements could not be served if detention could follow only from a criminal conviction.

The same cannot be said of al-Marri's confinement. Before it deemed him an enemy combatant, the government was prepared to try al-Marri on a seven-count indictment based on conduct connected to his alleged support of terrorism. Pet. App. 13a. If convicted, he would have faced up to 30 years imprisonment after sentencing enhancements for terrorism-related activity. *See* U.S.S.G. § 3A1.4. Many criminal statutes are available to prosecute alleged terrorists, *see, e.g.*, 18 U.S.C. § 2384 (criminalizing conspiracies to overthrow, make war, or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of "material support or resources" to terrorist organizations including concealing or disguising the source or ownership of material support or resources); 18 U.S.C. § 2332B (criminalizing "acts of terrorism transcending national boundaries"); 18 U.S.C. § 2339C (criminalizing the direct or indirect provision of funds to support terrorist activity), as well as manage the secrecy issues that arise in such prosecutions, *see* Classified Information Procedures Act (CIPA), §§ 1-16, 18 U.S.C. app. 3; Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801-1862; *see generally Hamdi*, 542 U.S. at 548 n.4 ("Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has

found no shortage of offenses to allege.") (Souter, J., concurring in the judgment).

Using such tools, the government has already engaged in many successful terrorism prosecutions. *See, e.g.*, *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006) (prosecution of suspected al Qaeda terrorist); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (prosecution of al Qaeda conspirator involved in 9/11); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004) (prosecution of Bin Laden ally who attempted to destroy an airplane with a bomb in his shoe); *United States v. Goba*, 240 F. Supp. 2d 242 (W.D.N.Y. 2003) (prosecution of al Qaeda operatives who met with Bin Laden and trained in terrorist camps in Afghanistan). Indeed, even Jose Padilla, who was for years detained alongside al-Marri as an enemy combatant, was eventually tried and convicted in a federal court and sentenced to 208 months, despite earlier assertions by the Executive that only his civil detention could keep the country safe. *United States v. Padilla*, No. 04-60001-CR (S.D. Fla. Jan. 22, 2008).

III. Because Preventive Detention Schemes Approved by This Court Have All Been Authorized by Clear Legislative Statements, Those Schemes Provide No Support for the View That Congress Implicitly Authorized al-Marri's Detention in the AUMF.

Just as they in no way suggest that al-Marri's detention meets due process requirements, this Court's preventive detention cases give no support to the government's claim to have implicit statutory authority to confine al-Marri. All of the preventive detention schemes that have been sustained by this Court were established by clear legislative statements. *See Hendricks*, 521 U.S. at 346 (Kan. Stat. Ann. 59-29a01 *et seq*); *Salerno*, 481 U.S. at 739 (Bail Reform Act); *Heller*, 509 U.S. at 315 (Ky.Rev.Stat.Ann. §§ 202A.076(2), 202B.160(2) (Michie 1991)); *Schall*,, 467 U.S. at 253 (New York Family Court Act); *Allen*, 478 U.S. at 365 (Illinois Sexually Dangerous Persons Act); *Addington*, 441 U.S. at 418 (Tex. Rev. Civ. Stat., Arts. 5547-31 *et seq*); *Pearson*, 309 U.S. at 371 (Chapter 369 of the Laws of Minnesota of 1939). Such explicit legislative direction is appropriate where the Executive would exercise a power, like indefinite detention, that raises such serious constitutional concerns.

Indeed, as noted above, in *Zadvydas* this Court held that even where a detention scheme is expressly authorized by statute, the Court will resist any interpretation providing for indefinite detention under that scheme, absent a clear statement by Congress, in order to avoid the "serious question as to whether, irrespective of the procedures used, the Constitution

permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696 (internal citations omitted).

Moreover, in reviewing detention schemes, this Court's jurisprudence places legislative purpose at the center of constitutional legitimacy. It has been the detailed legislative provisions—both of purpose and of limitation—that have enabled the Court to draw the critical constitutional line between impermissible punishment and legitimate regulation. *See Seling v. Young*, 531 U.S. 250, 262 (2001) ("[D]etermining the civil or punitive nature of an Act must begin with reference to its text and legislative history.").

Thus, the Court has closely scrutinized both the legislative intent behind the detention and the details of its implementation to confirm that they are consistent with the goals of civil confinement. *See, e.g.*, *Salerno*, 481 U.S. at 747-48 (examining legislative history and statutory terms to determine whether confinement is regulatory or punitive). Without explicit statutory directives, judicial review of this issue would be frustrated. In this respect as well, the government's claim that the AUMF implicitly authorized the indefinite confinement of al-Marri is not in accord in with this Court's precedents concerning civil detention.

CONCLUSION

For the foregoing reasons, the government's assertion of a power to indefinitely confine al-Marri, without charge or conviction, finds no support from this Court's precedents concerning civil detention.

Respectfully submitted,

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APPENDIX

APPENDIX

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